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Office of Administrative Law Judges
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Issue Date: 20 August 2004

Case No: 2001-BLA-1018
BRB No.: 02-0755 BLA

In the Matter of

DEE ROBERTS,
Claimant

v

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent.

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER ON REMAND DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On June 25, 2002, I issued a Decision and Order denying benefits to Claimant. On November 14, 2002, the Director appealed the decision, and, subsequently, the Benefits Review Board affirmed in part and vacated in part my decision in a May 13, 2003 Decision and Order. The case is now before me again, on remand.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX and CX refer to the exhibits of the Director and Claimant. The transcript of the hearing is cited as Tr. and by page number.

Remand Order of the Benefits Review Board

The Board affirmed my finding that Claimant had thirty-two years of coal mine employment and also my findings that the existence of pneumoconiosis cannot be established under Section 718.202(a)(1) and that it cannot be established under subsections (a)(2) and (3), as unchallenged on appeal. The Board affirmed my finding that the new x-ray evidence failed to establish the existence of pneumoconiosis and a material change in conditions. It also held that I correctly found that the newly submitted evidence was insufficient to establish clinical pneumoconiosis and was insufficient to establish total disability per 20 C.F.R. § 718.204 (b)(2). The Board remanded the case to address the following issues:

On appeal, the Benefits Review Board vacated my previous findings regarding whether the new evidence established the existence of legal pneumoconiosis and therefore a material change in conditions. Consequently, the following issues remain for resolution after the new medical opinion is reevaluated:

1. whether the newly submitted evidence, Dr. Baker's report, supports a finding of legal or statutory pneumoconiosis pursuant to 20 C.F.R. §718.201 and, if so, to provide a comparative analysis of the newly submitted evidence with the prior evidence in inquiring whether a material change in condition was established, specifically regarding how the newly submitted evidence differs qualitatively;

2. if a material change in conditions is established, whether a record review demonstrates the miner's totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. § 718.202 (a)(4) and the other elements of entitlement to disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Factual background as stated in the Decision and Order issued June 25, 2002 is incorporated by reference.

Medical Evidence

The medical evidence in the first claim was adequately set out in the previous Administrative Law Judge's Decision and Order, issued February 10, 1995 (DX 16-39), which was affirmed on appeal by Benefits Review Board Decision and Order dated July 24, 1995 (DX 16-01). The new medical evidence in the refiled claim was set out in my Decision and Order issued June 25, 2002. Such medical evidence in both decisions is hereby incorporated by reference.

DISCUSSION AND APPLICABLE LAW

Because Dee Roberts filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis,

that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Duplicate Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates a material change in condition. 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether a material change in conditions has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Benefits Review Board set forth its definition of "material change of conditions" under 20 C.F.R. §725.309 (d) in *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). In *Allen*, the Board overruled its holding in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992) and adopted the Director's position for establishing a material change in conditions under section 725.309, to wit: a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. Moreover, the Board made clear that a "material change" may only be based upon an element of entitlement which was previously denied. In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.), the Board held that a "material change in conditions" cannot be established based upon an element of entitlement which was not specifically adjudicated against the claimant in prior litigation.

The Sixth Circuit has adopted the Director's position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement that previously was adjudicated against him. If a claimant establishes the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996). In addition, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differs[s] qualitatively" from that which is newly submitted. *See Sharondale*, 42 F.3d at 998-99; *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608-10 (6th Cir. 2001). The court reasoned that such an approach "[a]ffords a miner a second chance to show entitlement to benefits provided his condition has worsened." *Sharondale*, 42 F.3d at 998. The court wrote that "entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits, but after a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted." *Id.*

Finally, in *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467, (6th Cir. 2003), a multiple claim case arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the administrative law judge resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." Once a "material change" is found, the judge must review the entire record *de novo* to determine ultimate entitlement to benefits.

Applying the *Ross* standard, I must review the evidence submitted subsequent to September 28, 2000, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Mr. Roberts in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If Claimant establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis.* "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
(2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201 (a).

Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. The Benefits Review Board affirmed my findings that the first three methods under § 718.202 (a)(1), (2), and (3) do not establish pneumoconiosis. Section 718.202 (a)(4) provides

the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202 (a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

The Board upheld my finding that the only new medical opinion diagnosing pneumoconiosis, that of Dr. Baker, does not establish "clinical pneumoconiosis" under section 718.202 (a)(4), because it was based upon a positive x-ray and coal dust exposure history and therefore did not constitute a "reasoned medical judgment" under *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). In *Cornett*, the Sixth Circuit held that, if a physician bases his or her finding of coal workers' pneumoconiosis only upon the miner's history of coal dust exposure and a positive chest x-ray, then the opinion "should not count as a reasoned medical judgment under § 718.202(a)(4)." Although the Board affirmed my finding that the newly submitted evidence failed to establish that Claimant suffered from "clinical pneumoconiosis," it remanded the case to me to determine whether the new evidence establishes "legal pneumoconiosis" and a material change in conditions.

The newly submitted evidence consists of only one medical report, that of Dr. Glen Baker. Dr. Baker examined Claimant on August 7, 2000. (DX 8). Dr. Baker recorded the claimant's coal mine employment, smoking and medical histories. Testing consisted of a chest x-ray, pulmonary function study, and an arterial blood gas study. After the examination, the doctor diagnosed: 1) coal workers' pneumoconiosis, based upon Claimant's chest x-ray and history of dust exposure; 2) mild restrictive defect, based upon Claimant's pulmonary test results; 3) mild resting arterial hypoxemia, based upon Claimant's arterial blood gas study results; 4) bronchitis based upon Claimant's history of cough, sputum production, and wheezing; and 5) ischemic heart disease, based upon Claimant's coronary artery bypass graft. Dr. Baker opined that the etiology of diagnoses 1 and 2 was "coal dust exposure" and 3 and 4 was "coal dust exposure/?cigarette smoking." The etiology for diagnosis number 5 was "ASHD [arteriosclerotic heart disease]. Again, since Dr. Baker's diagnosis of clinical pneumoconiosis was only based upon his chest x-ray interpretation and Claimant's history of exposure to coal dust, it was merely a restatement of his x-ray interpretation and does not constitute a reasoned and documented opinion under subsection (a)(4). However, Dr. Baker's opinion that the claimant suffers from legal pneumoconiosis is a well-reasoned and well-documented opinion. He set forth clinical observations and findings following his second examination of Claimant. He submitted Claimant to objective testing, and reasonably relied upon the results of those tests to support his opinion. Additionally, Dr. Baker noted Claimant's symptoms, and he considered an accurate account of Claimant's smoking and coal mine employment histories. He rendered diagnoses of mild restrictive defect from the pulmonary function studies, mild resting arterial hypoxemia, based upon the blood gas studies and bronchitis by history, all of which satisfy the legal definition of pneumoconiosis.

Dr. Baker's diagnoses are adequately supported by the evidence and, therefore his opinion is reasoned and documented. Accordingly, I find Dr. Baker's opinion is entitled to probative weight, enhanced by his credentials as a board-certified pulmonary specialist. Employer has submitted no evidence to the contrary. On the basis of Dr. Baker's reasoned medical opinion finding the existence of legal pneumoconiosis, I find that Claimant has established by a preponderance of the evidence the existence of pneumoconiosis under subsection (a) (4). Thus, Claimant has established an element of entitlement previously adjudicated against him. I must now compare the sum of the newly submitted evidence against the previously submitted evidence to determine if Claimant's condition has physically worsened and to find out if the newly submitted evidence is substantially more supportive.

In summary, the newly submitted evidence consists of one chest x-ray determined to be negative and one narrative medical report, with a reasoned medical opinion finding legal pneumoconiosis. The previously submitted evidence consists of thirteen interpretations of eight x-rays (or, possibly fourteen interpretations of nine x-rays, but this seems unlikely).[1] The evidence also included seven narrative reports. The previously submitted x-ray evidence dates back to 1991. Of the eight x-rays, five were initially read by physicians with qualifications of B-reader or less as positive and re-read by a physician who is dually-certified as a B-reader and Board-certified radiologist, Dr. Sargent, as negative. Two were read only once by B-readers as negative for pneumoconiosis. One, the earliest, was read as positive by a doctor with no special quailfications for reading chest x-rays. I accord greater weight to the opinions of Dr. Sargent on the basis of his credentials as a dually-certified physician. I find the 1991 x-rays to be negative, as did the previous administrative law judge, with the exception of the first x-ray dated July 18, 1991 by Dr. Anderson and do not accord that x-ray much weight because of his lack of special qualifications concerning reading x-rays. The August 26, 1991 x-ray by Dr. Baker is apparently an incorrectly dated version of his August 21, 1991 x-ray. I find that the 1992 x-ray is negative, as read by a B-reader.

Dr. Anderson's 1991 report diagnosed simple pneumoconciosis, based solely on a positive x-ray and years of coal mining employment. Dr. Bushey's report of the same year similarly diagnosed pulmonary fibrosis compatible with pneumoconiosis based upon a positive x-ray. In addition to diagnosing category 1 pneumoconiosis, Dr. Wright diagnosed chronic bronchitis in his 1991 report. In his 1991 report, Dr. Baker diagnosed simple pneumoconiosis based upon x-ray and years of exposure to coal dust; also mild resting arterial hypoxemia—much as he diagnosed in his 2000 report. Dr. Wicker diagnosed coal worker's pneumoconiosis in his 1991 report based upon a positive x-ray and exposure to coal dust. Dr. Broudy in a 1991 report diagnosed chronic bronchitis by history, but found no significant pulmonary disease or respiratory impairment arising from coal mining employment. Dr. Clarke in his 1991 report also diagnosed pneumoconiosis, based upon a positive x-ray, 35 years in the coal mining industry and significant reported daily dyspnea.

1 See Judge Morin's Decision and Order, fn. 4, describing probable incorrect reading date of Dr. Baker's x-ray. One x-ray dated 10/26/91 by Dr. Baker, with a listing on the form as read on 10/21/91 as positive (DX 19, 30), appears to be mislabeled and a duplicate of the 10/21/91 x-ray by Dr. Baker on 10/21/91 (DX 12). If it is indeed a separate positive x-ray, it has not been re-read by anyone.

A comparison of the newly submitted evidence with the previously submitted evidence does not establish that Claimant's conditions have worsened. The prior x-ray evidence was negative, just as the newly submitted x-ray evidence was negative. In 1991 there are reports of chronic bronchitis by Drs. Wright and Broudy. Dr. Baker reported mild resting arterial hypoxemia in 1991 and again in his report prepared in 2000, plus bronchitis. It is only in the latter report that Dr. Baker reports an etiology of coal dust exposure and questionably cigarette smoking for these two conditions. Claimant reports essentially the same subjective symptoms in his 1991 claim as in his 2000 claim. He reports similar symptoms (Dr. Baker's 1991 report: shortness of breath on practically an every night basis and sleeps on two pillows; occasionally has to get out of bed due to shortness of breath but has no definite paroxysmal nocturnal dyspnea); comparable activities in 1991 (just lays around the house; sometimes tries to walk a little; tries to hunt a little; in response to a question about whether he was able to work in a garden, responds "not very"; could walk 100 yards before he would have to slow up—Tr. 11-13 in November 3, 1994 hearing transcript) and 2000 (mostly every night have to get up and sit up for an hour or two; can't breathe. "Some times, not all the time." daily activities: watching TV, listening to the radio or read; does a little yard work, helps weed flowers; does some deer hunting from a truck; can walk 50 yards before would start breathing heavy—Tr. 11-13 in 2000 hearing transcript).

The instant case is illustrative of the concerns the Sixth Circuit voiced when endorsing the Director's interpretation of Section 725.309(d). *See Sharondale*, 42 F.3d at 997-98; *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d at 608-10. In *Sharondale*, the Court was careful to distinguish between a claimant re-litigating his case and a claimant demonstrating a worsening physical condition. "[T]he Director's interpretation . . . affords a miner a second chance to show entitlement to benefits *provided his condition has worsened*. The interpretation implicitly recognizes that the doctrine of res judicata is not implicated by the claimant's physical condition or the extent of his disability at two different times. *The entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits, but after a year has passed since the denial of his claim, no minor* [sic] *is entitled to benefits simply because his claim should have been granted." (Emphasis supplied).*

Total Disability Due to Pneumoconiosis

Claimant may still establish a material change in conditions by demonstrating that he is totally disabled under § 718.204(b) Claimant must demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.304.

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. The Board has already held that Claimant has failed "to establish total disability [under this subsection,] as the new pulmonary function and blood gas studies produced non-qualifying values, there was no evidence of cor pulmonale with right-sided congestive heart failure in the record, and Dr. Baker concluded that

claimant had the ability to perform his usual coal mine employment despite having a mild respiratory impairment." *Roberts v. Director, OWCP*, BRB No. 02-0755 (May 13, 2003), fn. 6.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forward with the evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204 (b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoco-niosis. § 718.204(a); Jewell Smokeless Coal Corp. v. Street, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Baker conducted a physical examination of the claimant on August 7, 2000 and took reports of his medical, social and coal mine employment history. He interpreted the results of pulmonary function testing as evidence of a mild restrictive defect and also conducted an arterial blood gas study that showed mild resting hypoxemia. Dr. Baker opined that Claimant suffers from an occupational disease caused by coal mine employment, however he retains the respiratory capacity to perform his usual coal mine work or comparable work in a dust-free environment. He set forth clinical observations and findings and relied upon adequate data to support his opinion. I find that Dr. Baker's opinion is entitled to probative weight, enhanced by his credentials as a Board-certified pulmonologist.

The newly submitted evidence does not contain a reasoned and documented opinion that Claimant is totally disabled due to a respiratory or pulmonary impairment. The medical opinion from Dr. Baker supports a finding that Claimant suffers from a mild respiratory impairment, a mild respiratory defect and mild resting arterial hypoxemia, as reflected in Dr. Baker's arterial blood gas studies. As found in the prior administrative law judge's decision, Claimant's previous coal mine employment required arduous manual labor. (Decision and Order issued February 10, 1995, DX 16-40). Dr. Baker in his 2000 report, which listed 35 years of underground coal mine employment, found that Claimant's impairment would not prevent him from working as a coal miner in a dust-free environment. He was apparently familiar with the exertional requirements of Claimant's coal mine employment. Claimant did not establish total disability under any subsection of 718.204(b)(2). The newly submitted evidence, when viewed as a whole, is insufficient to establish total disability. The objective pulmonary function studies produced values above the qualifying levels, and the narrative opinion establishes that Claimant's pulmonary impairment is not significant enough to prevent him from performing his previous coal mine employment.

Claimant has established the existence of pneumoconiosis by the newly submitted evidence under § 718.202(a)(4), but has not established that he is totally disabled. The prior record contained the following 1991 medical reports and evidence concerning total disability: Drs. Anderson, Wicker, Broudy after examining Claimant, taking his histories including coal

mine employment history into consideration and conducting objective testing, found that Claimant could return to his previous coal mine employment. Drs. Wright and Baker similarly recorded claimant's work, symptom and medical histories, conducted objective testing and found chronic bronchitis with little or no functional impairment and mild resting arterial hypoxemia, respectively. Dr. Baker further opined that Claimant should have no further exposure due to coal workers' pneumoconiosis and resting arterial hypoxemia[2]. Dr. Baker is a Board-certified pulmonary specialist. However, the equivocal nature of his opinion detracts from the weight I accord his 1991 opinion. Although the pulmonary function studies reflected values for FEV_1 and FVC exceeding 80% of predicted, Dr. Baker in his 1991 report found that Claimant may have difficulty doing sustained manual labor on an 8-hour basis even in a dust-free environment due to these conditions. Dr. Bushey examined the claimant, took his work and medical histories, but offered no opinion as to disability.

Only Dr. Clarke found the claimant to be totally disabled, after conducting examination and taking work and medical histories and conducting objective testing. He noted a mild restrictive pulmonary disease and no chronic obstructive airways disease based upon pulmonary function testing, yet "on the basis of the entire examination" found that the claimant is totally and permanently disabled. This appears to be based upon a positive x-ray and the miner's many years of coal mining employment. His opinion is entitled to only minimal weight since it does not appear to be supported by the evidence and therefore is not a reasoned opinion. Additionally, it stands in clear contrast to all the other opinions finding little or no impairment. The values for the pulmonary function studies declined some from the first studies conducted July 18, 1991 and the last in 1991 on October 8th. Moreover, the values have declined further in the second set of studies in 2000. Claimant, of course, is nine years older, however his aging does not appear to account for the entire decline. However, both sets of studies are not qualifying. Claimant's arterial blood gas study values have also declined—the PO_2 value. Although closer, the values are still not qualifying.

When the prior evidence of disability is compared to the present evidence, I find that Claimant has not demonstrated evidence of a worsening condition. As previously stated, the symptoms reported by the claimant have remained very similar. The prior record tracks Claimant's mild restrictive defect and mild resting arterial hypoxemia and chronic bronchitis, as does the newly submitted evidence. Dr. Baker characterized the decline as "mild resting arterial hypoxemia."

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2 Dr. Baker in 1991, while finding only a mild impairment, concluded that the claimant should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and resting arterial hypoxemia. He also found that the claimant may have difficulty doing sustained manual labor on an 8-hour basis even in a dust-free environment, due to these conditions. A finding of should "work in a dust-free environment" does not constitute a finding of total disability. *See White v. New White Coal Co.*, 22 B.L.R. 1- __, BRB No. 03-0367 BLA (Jan. 22, 2004). In his 2000 report, Dr. Baker indicated that the claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. To the extent Dr. Baker's 2000 opinion is inconsistent with his 1991 opinion concerning whether the claimant can perform his coal mine employment, based upon similar medical evidence, I would reduce the probative value assigned to the doctor's 1991 report. *See Surma v. Rochester & Pittsburgh Coal Co.,* 6 B.L.R. 1-799 (1984).

Additionally, unlike in *Grundy Mining Co. v. Director, OWCP [Flynn], supra*, where a physician submitted two medical reports in each of two successive claims showing a worsening physical condition, Dr. Baker did not find a "downgraded assessment" of the claimant, which could serve to support a material change in conditions; his assessment concerning any impairment the claimant suffers is improved between the 1991 and 2000 assessments. Claimant reported essentially the same symptoms and limitation of activities in 1991 as he did in 2000. Therefore, I find that Claimant has not established a worsening in his condition, with respect to establishing disability. There is no qualitative or substantive difference between the newly submitted evidence and the previously submitted evidence regarding total disability. Therefore, I find that Claimant has not established a material change in conditions. Since Claimant has failed to establish a material change in conditions since his prior denial, his duplicate claim must also be denied on the basis of the prior denial according to § 725.309(d).

Since there was a slight worsening in the pulmonary function and arterial blood gas study testing values, assuming arguendo that Claimant established a change in conditions, I will review the entire record to determine whether it establishes that the claimant is totally disabled.

If a change in conditions is assumed, when reviewing the record as a whole, Dr. Baker's 2000 opinion that Claimant suffers from pneumoconiosis would be sufficient to establish, by a preponderance of the evidence, that Claimant suffers from pneumoconiosis from that point forward. The opinions considered by Administrative Law Judge Morin were rendered in 1991. I accord greater weight to the more recent opinion of Dr. Baker, since it is clearly more indicative of Claimant's current status. However, the newly submitted evidence was insufficient to establish total disability. Administrative Law Judge Morin previously found the 1991 medical evidence insufficient to establish total disability. That evidence included a report by the only doctor who has ever opined that the claimant is totally disabled due to pneumoconiosis, Dr. Clarke, who based that opinion primarily on a positive x-ray, shortness of breath symptoms and a reported history of 35 years of coal mine employment. I do not find Dr. Clarke's opinion to be a reasoned one, where the pulmonary function testing indicated only mild restriction, and he gives no other reason for finding this impairment disabling. Accordingly, I am assigning his opinion no weight. Moreover, the six other physicians rendering opinions in 1991 either found no impairment (Drs. Anderson, Wicker, Wright, and Broudy), mild impairment (Dr. Baker), or did not address Claimant's respiratory capacity (Dr. Bushey). I assign these reports probative weight because they are reasoned and supported by the medical evidence. Pulmonary function testing and arterial blood gas studies have shown a decline over the nine-plus years, however they all fail to establish disability.

In considering all of the evidence addressing total disability, I find that, based upon the record as a whole, Claimant is unable to establish that he is totally disabled. Therefore, I find that Claimant is not entitled to benefits since he cannot establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment.

Conclusion

The Claimant has failed to establish a material change in conditions since his prior denial of benefits. Additionally, assuming arguendo a change in conditions, the sum of the evidence fails to establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Mr. Dee Roberts for benefits under the Act is denied.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.